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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* YIXIN DIAO, DENISE Y. DYKO, FRANK N. ESKESEN,  
JOSEPH L. HELLERSTEIN, ALEXANDER KELLER,  
and LISA F. SPAINHOWER

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Appeal 2009-011214  
Application 10/648,179  
Technology Center 2100

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Before, ALLEN R. MACDONALD, KALYAN K. DESHPANDE, and  
DAVID M. KOHUT, *Administrative Patent Judges*.

KOHUT, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134(a) of the final  
rejection of claims 1-33. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm-in-part the Examiner's rejection of these claims.

### INVENTION

The invention is directed to a method, article of manufacture, and apparatus for constructing a resource model by obtaining at least a portion of resource metrics associated with a resource abstract model. *See Spec.* 3-5.

Claim 1 is representative of the invention and is reproduced below:

1. A method of constructing a model representative of a resource for use in managing a service associated with the resource, comprising the steps of:
  - associating a resource abstract model with the resource, wherein the resource abstract model is configured to automatically determine a set of resource metrics to be used to construct a model representative of the resource such that a reduced set of resource metrics is considered; and
  - constructing the model representative of the resource based on the reduced set of resource metrics obtained in accordance with the resource abstract model.

### REFERENCE

Bigus et al., "AutoTune: A Generic Agent for Automated Performance Tuning," 2000, Practical Application of Intelligent Agents and Multi-Agent Technology, pgs. 1-20.

### REJECTION AT ISSUE

Claims 1-33 are rejected under 35 U.S.C. § 102(b) as being anticipated by Bigus. Ans. 3-8.

### ISSUES

- a) Did the Examiner err in finding that Bigus discloses wherein the resource abstract model is configured to automatically determine a set of resource metrics to be used to construct a model representative of the resource such that a reduced set of resource metrics is considered; and constructing the model representative of

the resource based on the reduced set of resource metrics obtained in accordance with the resource abstract model?

- b) Did the Examiner err in finding that Bigus discloses obtaining a topology of one or more resources used to deliver one or more services associated with the one or more service level agreements?

### ANALYSIS

Appellants select claim 1 as representative of the group comprising claims 1-5, 7-14, 16-23, 25-29, and 31-33. App. Br. 8. Appellants' Appeal Brief begins by describing independent claim 1, followed by a recitation of the portions of the reference cited by the Examiner, the Appellants' understanding of the reference, and finally a statement by Appellants that the reference does not disclose that which is claimed. App. Br. 5-8. In response, the Examiner lists each of the claim limitations, the Examiner's interpretation of the claim limitations, and citations to the Bigus reference that describe those limitations. Ans. 12-17. Appellants' statements do not address these specific findings by the Examiner. Thus, we sustain the Examiner's rejection as Appellants' statements have not identified an error in the finding supporting the rejection.

Appellants additionally argue in the Reply Brief on pages 3-4 that Bigus discloses wherein the system model is obtained using a fixed set of metrics rather than the claimed reduced set of metrics. However, these arguments raise a new issue not presented before in the Appeal Brief and will, therefore, not be considered. *See* 37 C.F.R. § 41.41(b). Even so, Appellants have not provided evidence or arguments as to why the listed metrics in Bigus are considered "fixed." Thus, we sustain the Examiner's rejection of claims 1-5, 7-14, 16-23, 25-29, and 31-33.

Claim 6 recites, “obtaining a topology of one or more resources used to deliver one or more services associated with the one or more service level agreements.” Claims 15, 24, and 30 contain similar limitations. Appellants make similar arguments with respect to claims 6, 15, 24, and 30 as with claim 1. App. Br. 8. Regarding those arguments, we agree with the Examiner for the same reasons listed above.

However, Appellants assert an additional argument with respect to claim 6. Appellants and the Examiner agree that the term “topology” is specifically defined in the Specification as “the minimal set of resources that may be used in service delivery.” App. Br. 8, Specification 7, and Ans. 19. The Examiner finds that Bigus discloses minimizing response times by “*Scheduling* different classes of customers on a set of distributed, heterogenous servers,” which corresponds to a minimal set of resources used in service delivery. Ans. 19. Appellants argue that the relied upon portion of Bigus does not disclose a minimal set of resources.

Here, we agree with the Appellants. While Bigus does in fact disclose minimizing response times by scheduling servers for different classes of customers, the Examiner has not shown and we do not find that Bigus necessarily schedules the “minimum” number of servers. Thus, we cannot sustain the Examiner’s rejection of claims 6, 15, 24, or 30.

#### CONCLUSION

- a) The Examiner did not err in finding that Bigus discloses wherein the resource abstract model is configured to automatically determine a set of resource metrics to be used to construct a model representative of the resource such that a reduced set of resource metrics is considered; and constructing the model representative of

the resource based on the reduced set of resource metrics obtained in accordance with the resource abstract model.

- b) The Examiner erred in finding that Bigus discloses obtaining a topology of one or more resources used to deliver one or more services associated with the one or more service level agreements.

#### SUMMARY

The Examiner's decision to reject claims 1-5, 7-14, 16-23, 25-29, and 31-33 is affirmed. The Examiner's decision to reject claims 6, 15, 24, and 30 is reversed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136 (a)(1)(iv).

#### AFFIRMED-IN-PART

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